

RE: Rule 1-300 [ABA MR 5.5]
6/10/05 Commission Meeting
Open Session Item III.E.

-----Original Message-----

From: Kevin Mohr [mailto:kemohr@comcast.net]
Sent: Friday, April 08, 2005 2:19 PM
To: RAUL MARTINEZ; Ellen Peck; Mark Tuft
Cc: Harry Sondheim; Difuntorum, Randall; McCurdy, Lauren; Kevin Mohr
Subject: RRC - 1-300 (Rule 5.3) - Post 4/1 & 4/2/05 Meeting Materials [Agenda III.I]

Greetings:

I've attached the following:

1. Draft 7 (04/08/05) of proposed rule 5.3, incorporating changes approved at the 4/1 & 4/2/2005 meeting, in Word, and flagging any outstanding drafting issues (I'm not sure any remain). In WP.
2. File comparing draft 7 to MR 5.3, in PDF.
3. File comparing draft 7 to draft 6.2, which was considered at the meeting.
4. My notes from the meeting, in WP and PDF.

The only issue I think that remains is whether any further work needs be done on rule 5.3.1 [1-311], which the RRC voted to break out of rule 5.3 at the meeting. Although the RRC voted to substitute "lawyer" for "member" throughout rule 5.3 while 1-311 was still part of it, we may want to revisit that issue. Correct me if I'm wrong, but I think 1-311 allows California-admitted lawyers to employ lawyers who had formerly been admitted in California but are not disbarred, etc., to work in their offices doing law-related tasks under their supervision. I'm not sure the rule was intended to allow disbarred lawyers from other jurisdictions to be similarly employed. California is one of a handful of states that even permit disbarred or suspended lawyers to do law-related tasks in a law office and I think this rule may be one that should retain the "member" terminology. Is this correct? Please advise. I don't think the MJP rules of court have changed this.

As usual, if you have any questions, please ask.

Kevin

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[Proposed] Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with¹ a lawyer:

- (a) a partner, and a lawyer² who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;³
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner⁴ or has comparable managerial authority⁵ in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.⁶

Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate

instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential⁷ information relating to representation of the client, and should be responsible for their work product. The measures employed in instructing and supervising nonlawyers should take account of the fact that they may⁸ not have legal training.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (a) applies to lawyers with managerial authority in corporate and government legal departments and legal service organizations as well as to partners and other managing lawyers in private law firms.⁹

[3] Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.¹⁰

Drafters' Notes

1. **RRC Action:** At 7/9/04 Meeting, RRC voted 4 for, 6 against (1 abstention) on motion to make specific reference to “outsourcing” in the Discussion.

2. **RRC Action:** At 4/1 & 4/2/2005 meeting, the RRC voted 7 to 0, with 2 abstentions, to substitute “lawyer” for “member” throughout the rule.

3. **RRC Action:** At 4/1 & 4/2/2005 meeting, the RRC voted 7 to 0, with 2 abstentions, to conform the language of proposed rule 5.3 to the language previously adopted for proposed rule 5.1. The result is that the language of MR 5.3(a) was adopted.

RRC Action: Previously, at 7/9/04 Meeting, motion was made to change the language to “conforms to the Rules of Professional Conduct,” but no second made. Language stays the same.

4. **Drafters' Note:** The words “officer, or director,” have been deleted to conform the language of subparagraph (c)(2) to that of paragraph (a) and Model Rule 5.3.

5. **RRC Action:** At 7/9/04 Meeting, the RRC voted 8 to 1 (2 abstentions) to change the language here to conform with the language changes to paragraph (a).

6. **RRC Action/Drafters' Note:** (1) At the 4/1 & 4/2/2005 meeting, Bob Kehr suggested that the RRC consider adding the concept of “aid” in paragraph (c). However, recognizing that the construction of rule 5.3(c) parallels that of rule 5.1(c), he withdrew the suggestion, but requested that the RRC revisit the concept of “aid” in both 5.1(c) and 5.3(c) before the Final Report of the Commission is issued.

(2) **Rule 5.3.1 [1-311].** In earlier drafts, rule 1-311 (“Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member”), which was approved at the 7/11/2003 meeting, was incorporated into proposed rule 5.3 to be considered under the rubric of rule 1-300 as part of the series of rules related to the concept of the “practice of law.” Rule 1-311 was inserted in proposed rule 5.3 as paragraphs (d) through (I). At the 4/1 & 4/2/2005 meeting, however, the RRC voted 9 to 0, with no abstentions, to move paragraphs (d) – (i) of proposed rule 5.3 back into a separate rule, and renumber that rule 5.3.1. In addition, the drafters have moved comments [4] and [5], which were the second and third paragraphs of the rule 1-311 Discussion, to proposed rule 5.3.1. It was argued that removing the substance of the approved rule from rule 5.3 and placing it in a separate rule should avoid confusion for those familiar with ABA Model Rule 5.3, as well as give prominence to a concept that very few states have in their rules: the regulation of disbarred, suspended or otherwise involuntarily inactive lawyers under supervision of another lawyer. Most states prohibit such involuntarily inactive lawyers (disbarred, suspended, etc.) from working at all in law firms. It was also observed that rule 1-311 is stylistically divergent from the rest of rule 5.3.

7. **RRC Action:** At the 4/1 & 4/2/2005 meeting, the addition of the word “confidential” was deemed approved.

8. **RRC Action:** Changed “do” to “may” by consensus at 7/9/04 Meeting. Nonlawyer assistants may have legal training, so more accurate to state that they “may not have” it.

9. **RRC Action:** At the 4/1 & 4/2/2005 meeting, a proposal by Mark Tuft to add this sentence, drawn from the Ethics 2000 Reporter's Explanation of Changes, to comment [2] was deemed approved.

10. **RRC Action:** (1) At the 4/1 & 4/2/2005 meeting, a motion to delete the first sentence of comment [3], which provided: "Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer," as surplusage was passed by a vote of 6 in favor, 1 opposed, and 1 abstention.

(2) The RRC also voted 6 to 1, with 2 abstentions, to delete a comment which had provided, "Concerning the meaning of "the practice of law" or "practice law," see rule 5.5, comments [4]-[6]."

(3) In addition, the drafters have moved comments [4] and [5], which were the second and third paragraphs of the rule 1-311 Discussion, to proposed rule 5.3.1.

RRC – Rule 5.3 [1-300]
REDLINE Comparison to Model Rule 5.3
Draft 7
April 8, 2005
Following April 1 & 2, 2005 Meeting
Ellen R. Peck (MT, KEM, ed.)

[Proposed] Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's ~~person's~~ conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's¹ conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's¹ professional services. A lawyer must give such assistants appropriate

instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information relating to representation of the client, and should be responsible for their work product. The measures employed in instructing and supervising nonlawyers should take account of the fact that they do may not have legal training ~~and are not subject to professional discipline.~~

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (a) applies to lawyers with managerial authority in corporate and government legal departments and legal service organizations as well as to partners and other managing lawyers in private law firms. ~~Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer.~~

[3] Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[Proposed] Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

———With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, ~~officer or director, or~~and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
- (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a partner, ~~officer or director,~~ or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
- ~~(d) A member shall not employ, associate professionally with, or aid a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the member's client:~~

- ~~————— (1) ——— Render legal consultation or advice to the client;~~
- ~~————— (2) ——— Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;~~
- ~~————— (3) ——— Appear as a representative of the client at a deposition or other discovery matter;~~
- ~~————— (4) ——— Negotiate or transact any matter for or on behalf of the client with third parties;~~
- ~~————— (5) ——— Receive, disburse or otherwise handle the client's funds; or~~
- ~~————— (6) ——— Engage in activities which constitute the practice of law.~~
- ~~————— (e) ——— A member may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to:~~
 - ~~————— (1) ——— Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;~~
 - ~~————— (2) ——— Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or~~
 - ~~————— (3) ——— Accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active member who will appear as the representative of the client.~~
- ~~————— (f) ——— Prior to or at the time of employing a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the member shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (d) and state that the disbarred, suspended, resigned, or involuntarily inactive~~

~~member will not perform such activities. The information contained in such notices shall be available to the public. The member shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The member shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the member's employment by the client.~~

~~(g) A member may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.~~

~~(h) Upon termination of the employment of a disbarred, suspended, resigned, or involuntarily inactive member, the member shall promptly serve upon the State Bar written notice of the termination.~~

~~(i) For the purposes of subparagraphs (d)-(g):~~

~~(1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;~~

~~(2) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code sections 6007, 6203(d)(1), or California Rule of Court 958(d), and~~

~~(3) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.~~

Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate

instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information relating to representation of the client, and should be responsible for their work product. The measures employed in instructing and supervising nonlawyers should take account of the fact that they may not have legal training.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to ~~[Rule 5.1].~~ Paragraph (a) applies to lawyers with managerial authority in corporate and government legal departments and legal service organizations as well as to partners and other managing lawyers in private law firms.

[3] ~~Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer.~~ Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

~~[3] Concerning the meaning of “the practice of law” or “practice law,” see rule 5.5, comments [4]-[6].~~

~~[4] Sub-Paragraph (f) is not intended to prevent or discourage a member from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client’s matter. If a member’s client is an organization, then the written notice required by paragraph (f) shall be served upon the highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule 1.13 [3-600] [Organization as Client].)~~

~~[5] Nothing in rule 5.3 shall be deemed to limit or preclude any activity engaged in pursuant to rules 983 [Counsel *pro hac vice*], 983.1 [Appearance by military counsel], 983.2 [Certified law student], and 988 [Registered foreign legal consultant] of the California Rules of Court, or any local rule of a federal district court concerning admission *pro hac vice*.~~

*Tuft
Martinez
Peck

- I. **Consideration of Rule 1-300 [ABA MR 5.5] (Unauthorized Practice of Law) (Including consideration of discussion section re “definition of the practice of law”)**
[anticipated 1-hour discussion]
(Materials enclosed.) **[pages 79 – 144].**

IMPORTANT PRE-MEETING DEADLINE: As indicated in the assignment agenda and covering memo, the chair may deem 1-300 and proposed comments 1-5 relating thereto as adopted by the Commission absent written objection, together with an explanation of the objection, **by March 23.**

Rule Draft 6.2 (3/2/2005) by Peck & Mohr

[Proposed] Rule 5.5 Unauthorized Practice of Law

- (a) A lawyer admitted to practice law in California shall not:
 - (1) practice law in a jurisdiction where to do so violates the regulation of the legal profession in that jurisdiction; or
 - (2) assist or aid a person or entity in the performance of activity that constitutes the unauthorized practice of law.
- (b) A lawyer who is not admitted to practice law in California shall not:
 - (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in California for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted or entitled to practice law in California.

Rule Draft by Mark Tuft (3/3/2005)

[Proposed] Rule 5.5 Unauthorized Practice of Law

- (a) A lawyer admitted to practice in this jurisdiction shall not:
 - (1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
 - (2) assist or aid any person or entity in the unauthorized practice of law.
- (b) Except as authorized by these Rules or other law, a lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) establish an office or otherwise practice law in this jurisdiction; or
 - (2) advertise or hold himself or herself out to the public or otherwise represent that he or she is admitted or entitled to practice law in this jurisdiction.

NOTE: Consideration of Proposed Rule 5.5 was deferred. Instead, Commission consider Rule 5.3, draft 6.2 (03/03/05), which was part of the Agenda package at pages 129-136.

KEM: Explained that originally four rules had been packaged together under the rubric of Rule 1-300, as all related to the concept of the “practice of law”: Model Rule 5.3 (Responsibilities Regarding Non-lawyer Assistants); Model Rule 5.4 (Independence of Professional Judgment); Model Rule 5.5/Cal. Rule 1-300 (Practice of Law); and Cal. Rule 1-600 (Legal Service Programs).

MR 5.4 was designated 1-310X and addressed by Mark Tuft; it was kept in the package simply as a place holder. Rule 1-600(B) was also largely a placeholder, eventually being incorporated in part into our proposed rule 5.4 (1-310X). Proposed Rule 5.3 was modeled on MR 5.3, but rule 1-311, which had already been considered and voted out by the Commission, was inserted into the rule. Proposed Rule 5.5 was modeled on Cal. Rule 1-300, but the Discussion was expanded substantially to include examples of case law addressing the concept of “practice of law”.

Through the first five drafts, all the rules were presented at meetings in the same document, though they were considered separately. For draft 6.2, proposed rules 5.3 and 5.5 were put into separate documents.

CONCERNING PROPOSED RULE 5.3 [Draft 6.2]:

1. **MOTION** (Endnote 2): Change “member” to “lawyer” throughout the rule.

Yes: 7 No: 0 abstain: 2

2. **MOTION** (Endnote 3): Although the RRC previously voted to revise Model Rule 5.3(a), motion was made to go back and redraft to conform the language in 5.3(a) to proposed rule 5.1(a):

“(a) a partner, ~~officer or director, or and~~ a lawyer who individually or together with other lawyers possesses comparable managerial authority . . .”

Yes: 7 No: 0 Abstain: 2

3. Mark: Rule 1-311. We have put it rule in 5.3, but it doesn't read very well with rule 5.3.

- a. **MOTION**: Put Rule 1-311, as previously approved, in its own rule. [Rule 5.3.1.]

YES: 9 NO: 0 ABSTAIN:

- b. Mark would also like Rule 1-311 revised.

(1) Harry: The rule was voted out. We won't revise it at this time.

4. Mary: Is concerned with a simple cross-reference to 5.1 and 5.3 in rule 3-110.

a. That is not enough because 5.3 is more narrow than the Cal. Case law.

b. Bob & Ellen: Both explain that both (a) and (b) are disciplinary.

c. Sean: Discusses the trust fund hypothetical.

5. Bob: suggested we include “or aid” in paragraph (c), but because the construction parallels 5.1(c), withdrew suggestion, but requests the RRC address the issue of “or aid” together with 5.1 at some point before the final report is issued.

6. Harry: We'll address the remaining “issues” re rule 5.3.

7. **Endnote 13.** As requested by Jerry Sapiro, addition of “confidential” to modify “information” in the third sentence of comment [1] was deemed approved.

8. **Endnote 17.** Request by Mark Tuft to add the following sentence to comment [3] deemed approved:
“Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.”

8. **MOTION:** Delete first sentence of comment [3] in draft 6.2
“Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer.”
YES: 6 NO: 1 ABSTAIN: 1

a. Bob: Need to track the comments of 5.1.

9. **MOTION:** Delete second comment [3] in draft 6.2.
~~Concerning the meaning of “the practice of law” or “practice law,” see rule 5.5, comments [4]–[6].~~
YES: 6 NO: 1 ABSTAIN: 2

a. Bob: Need to track the comments of 5.1.

10. KEM: Need to explain differences between MR and Cal. Rule.
a. Paul: The comment was redundant.
b. KEM: Has been using the word “surplusage.”
11. Kurt: Would invite discussion comments of what we have now – to interpret the material and a kind of legislative history.
12. Retained part of comment [3]. Keep as placeholder for rule 5.7.